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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT LEE NOBLES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT ROBERT LEE NOBLES

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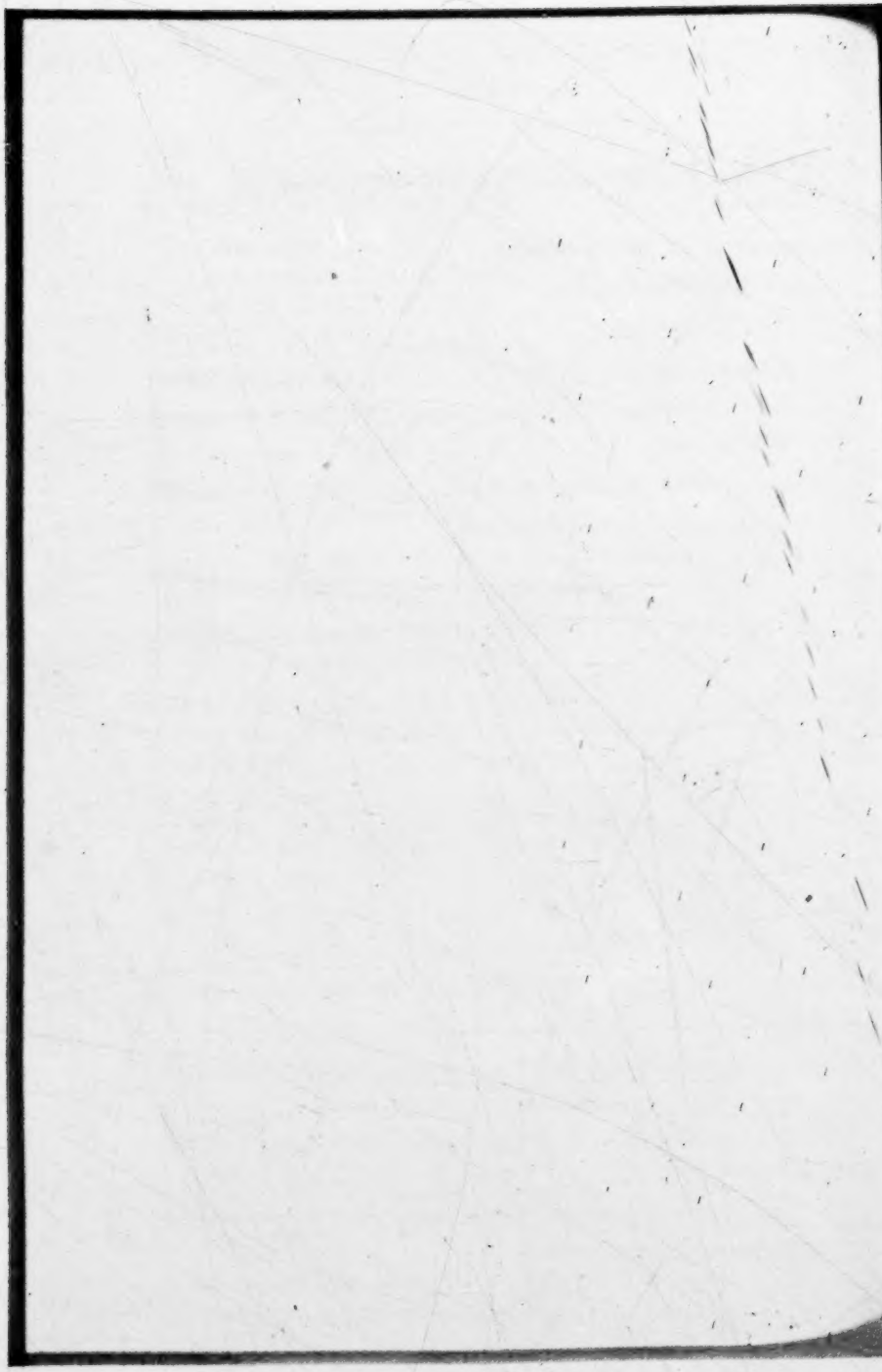
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT ROBERT LEE NOBLES

QUESTIONS PRESENTED

1. Whether the trial court erred in conditioning the respondent's right to present the defense investigator's impeaching testimony upon production to the prosecution of portions of the investigator's report containing the prior inconsistent statements of the government witnesses to the investigator.

2. Whether the misconduct of the prosecutor constitutes a separate grounds for affirming the judgment of the court of appeals.

3. Whether the trial court abused its discretion in refusing to permit the testimony of respondent's expert on eyewitness identification and whether such error constitutes a separate grounds for affirming the judgment of the court of appeals.

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

Respondent adds the following to those stated by the government:

1. The Sixth Amendment to the United States Constitution provides in pertinent part,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT

Respondent, Robert Lee Nobles, and two others were convicted of armed bank robbery in violation of 18 U.S.C. § 2113 (a) (d).[1] The conviction of respondent was reversed by a panel of the United States Court of

[1] A fourth individual was indicted for the offense but did not stand trial.

Appeals for the Ninth Circuit, with one judge dissenting. [Pet. App. A; 501 F.2d 146][2] The court of appeals denied a petition for rehearing with a suggestion for rehearing en banc. [Pet. App. C]

The court of appeals recognized that the evidence against respondent was relatively meager, consisting primarily of the testimony of two eyewitnesses, Peter Van Gemeren, a bank teller [Tr. 22-23] and Gary Hoffman, a salesman visiting the bank [Tr. 323-25, 420-21].[3] Van Gemeren identified respondent as the man standing under the surveillance camera, although the man under this camera was the farthest away from him (approx. twenty feet) of any of the four robbers. [Tr. 38]. A post which he testified was 7 inches wide but which was later shown to have dimensions of 20 x 11¾ inches stood between him and the surveillance camera. [Tr. 535] He admitted that he had paid closer attention to two of the other robbers. [Tr. 35, 38]

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[2]The convictions of the other two defendants, Tommie Louis Brown and Virgil David Swain, were affirmed.

[3]The court of appeals concluded that the "eyewitness testimony was far less impressive against Nobles than against Brown and Swain." [Pet. App. 6a] The only other evidence introduced against respondent consisted of an ambiguous statement: at the time of his arrest, he denied he was Robert Lee Nobles, and subsequently stated that he knew the F.B.I had been looking for him. The evidence against Brown and Swain, on the other hand, was overwhelming; it included items such as a gun and clothes taken from an apartment shared by them, a statement by Brown, testimony by a number of eyewitnesses, surveillance photographs, and the testimony of an F.B.I. expert who compared the surveillance photographs of the robbers with known photographs of Brown and Swain.

Van Gemeren did not remember whether the man under the surveillance camera faced toward him or away from him, but thought that his side was visible for a "half a minute" [App. 9]; he acknowledged finally that for "most of the time" the man's back was to him. [App. 9] Van Gemeren also acknowledged that he told the F.B.I. the man was facing toward the bank manager [Tr. 58, 60, 70], and therefore away from Van Gemeren.[4] Despite Van Gemeren's testimony, the prosecutor interrupted defense counsel's cross-examination, misstating the evidence in the presence of the jury, and claiming "this witness has testified as to the fact that he observed this person's face, that he then turned toward the bank manager, he saw him from the side and from the front." [App. 10]

Van Gemeren's memory proved faulty concerning many important details of the robbery. He could not recollect whether the man under the surveillance camera was wearing a hat or jacket. [Tr. 33-4] He could not "recall" the exact date of the robbery. [Tr. 43] He could not "recall" whether it was the F.B.I. or Los Angeles Police Department Officials who interviewed

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[4]The bank was designed so that as one entered the front door, a series of teller's cages extended to the left, from the front to the rear of the bank. To the right, extending from front to rear, was the business counter. Directly in front of the door was a lobby. The surveillance camera was placed near the ceiling to the right of the front door and about three feet into the lobby from the business counter. (See diagram of bank, Govt. Ex. 1; Tr. 252) The bank manager was seated behind the business counter. [Tr. 58] Van Gemeren, a teller, was standing behind a teller's cage directly across the lobby from the business counter. [Tr. 14-15, 58]

him two weeks after the robbery or on other occasions. [Tr. 42, 70]. When asked if he had told the F.B.I. two weeks after the robbery that the man under the surveillance camera had "black hair, worn bushily" and had worn a "floppy hat", Van Gemeren turned to the judge and stated, "Your Honor, that interview was many weeks ago. I cannot recall what I said." [Tr. 64] On April 11th, he could not "recall" that on the previous day he had testified that he could not "recall" whether the man under the surveillance camera was looking toward him or away from him. [R.T. 88] He could not "recall" whether he had told John Bond, chief investigator for the Federal Public Defender, that the only part of the man he had seen was his back. [App. 11, 12] He also could not "recall" whether the day on which John Bond interviewed him was nearer in time to the bank robbery than "today." [Tr. 100]

Two months after the robbery, on the morning of trial, Van Gemeren saw respondent for the first time. The prosecutor told him to go into the courtroom and look at the three defendants to see if he could recognize any of them. [Tr. 82-84] Van Gemeren went into the courtroom and sat down in the second or third row. He saw the defendants seated in the first row, ahead of him and to his left. He decided, based on this observation, that Robert Lee Nobles was one of the robbers. [Tr. 82-84]

Gary Hoffman, the other eyewitness, identified Robert Lee Nobles as the man standing with his back against the business counter, 24 feet away from the surveillance camera on his left and facing the tellers' cages across the lobby. [Tr. 318, 327; see note 4, supra]. He said the robbery lasted from 5-8 minutes

and he focused his attention on the man underneath the camera for 2-3 minutes [Tr. 328]. However, he also testified that he observed defendant Brown working behind the tellers' cages for three or four minutes, then watched him jump the counter at the rear and exit the bank [Tr. 343, 344]. Hoffman said the man under the camera generally faced toward the tellers' cages and occasionally shifted to his right [App. 18] Although Hoffman never said that the robber faced him – his testimony, in fact, indicated that he saw the robber only from the side – the prosecutor interrupted the cross-examination and stated, in front of the jury, "He said he faced both ways, toward the witness and toward the tellers' area". [App. 19][5]

Directly contrary to the testimony of Van Gemeren was that of Hoffman, who testified subsequently that he did not recall the man under the surveillance camera facing the business counter at any time. (App. 19) Hoffman said that when F.B.I. agent Wilkins showed him some photographs seven weeks after the robbery, he hoped that the meeting would not be a waste of time and that he would be able to pick out someone from the photographs. [Tr. 394] At that time, Hoffman told Agent Wilkins that he could give only a general description of the robber who stood underneath the surveillance camera. He picked Nobles' photograph from a group of six pictures, but was not absolutely

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[5]If the man under the surveillance camera were facing the tellers' cages, he would have had to turn more than 90° to his right to face Hoffman, since the surveillance camera was located several feet into the lobby from the business counter against which Hoffman was leaning. [Tr. 381; see note 4, supra].

sure that he was the man. [Tr. 401] Two days later, on March 30th, he attended a lineup, and, seeing Robert Lee Nobles for the first time, chose him from the lineup, although he was not 100% sure that he was one of the robbers. [Tr. 404]

Hoffman testified that the robber who was underneath the surveillance camera was the one he saw most clearly, but subsequently admitted that he told John Bond, respondent's investigator, that "the man who was standing at the teller's cage directly across from [him] was the one [he] could see more clearly and would be able to identify." [Tr. 417] That robber was alleged to be the man who did not stand trial. Hoffman denied telling John Bond that all blacks look alike [App. 10].

Respondent presented a defense of alibi, but, as the court of appeals noted, his strongest defense was in showing the weakness of the identifications by Van Gemeren and Hoffman. Respondent, however, was not permitted to present his most compelling evidence which would have destroyed the credibility of the eyewitnesses' testimony. First, the court refused to permit respondent's expert in eyewitness identification to testify. Second, the court refused to permit respondent's investigator, John Bond, to impeach the testimony of the eyewitnesses with prior inconsistent statements. Bond would have said that Van Gemeren had previously told him that "as far as the man at the surveillance camera is concerned he (Van Gemeren) only saw the back of that man" [App. 15], and that Hoffman had previously told him that "all blacks look alike." [App. 10]

The court precluded John Bond's testimony because defense counsel signified that he would not obey the

court's order to disclose to the government, at the end of the direct testimony of John Bond, "those portions of [John Bond's investigative] report which contain . . . the alleged impeaching statements of the witnesses." [App. 32-3] Although the reports corroborated what would have been John Bond's testimony, defense counsel realized that the order represented a dangerous precedent, a precedent which would substantially alter the rules governing discovery of defense documents and violate the constitutional rights of respondent. [App. 25a-26a] (Deft. ex. H , Tr. 751)[6] The court of appeals agreed and reversed the conviction of respondent.

SUMMARY

1. The trial court's order that defense counsel disclose to the government those portions of John Bond's investigative reports which contained the inconsistent statements of the eyewitnesses violated the rules of discovery governing disclosure of documents at trial.

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[6] Despite the fact that the prosecutor knew Bond would have testified to the impeaching statements, had he been permitted to do so, he told the jury during closing argument that Bond did not testify because the witnesses had never made the statements to him. [App. 41] After the prosecutor's closing argument, defense counsel objected to his statements and had John Bond's reports lodged with the court for inspection by the court of appeals. Hoffman's statement was marked as defense exhibit G at that time but now is defense exhibit H on the list of exhibits. Van Gemeren's statement had already been placed with the clerk as defense exhibit A [Tr. 750-1, 753].

Both the court of appeals in the instant case and the only other federal court which has faced the issue presented by this case, have held that the statutory scheme, composed of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500, specifically prohibits discovery of defense investigator's reports at any time. (Pet. App. 1a); *United States v. Wright*, 489 F.2d 1181, 1191-2 (C.A.D.C.). Thus, Rule 16(c) in its work product savings clause, forbids the "discovery or inspection" of "reports" made by a defense investigator "in connection with the investigation" of the case or of "statements" of "government witnesses" to the "agents" of the defendant. Rule 16 sets standards for disclosure at trial as well as prior to trial, as evidenced by the fact that the rule carefully includes the exception to discovery of statements in the Jencks Act, applicable by its terms only at trial. The Jencks Act gives defendants access to statements of government witnesses after their direct testimony. The act provides for no reciprocal right of the government to discover statements of defense witnesses at any time.

The common law rules of evidence in effect at the time of the trial and the new Federal Rules of Evidence complement this statutory scheme and neither provide for nor authorize discovery of any part of these reports.

Thus, while the trial judge may have had discretion during trial to fashion orders which interpreted as well as supplemented Rule 16 and the Jencks Act, he did not have discretion to order disclosure which the rules specifically prohibit. *Cf. Palermo v. United States*, 360 U.S. 343.

The government's proposal is incompatible with the fundamental principal of our accusatory system that the government "shoulder the entire load" of proof. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55. A defendant has no obligation to assist the government. On the other hand, the government has a duty to provide information to the defendant which is material to his defense. *See United States v. Reynolds*, 345 U.S. 1, 12; *Brady v. Maryland*, 373 U.S. 83, 87. As a consequence, the suggestion that the government's discovery rights should be as broad as those of the defense contravenes the policy of favoring the defendant in order to avoid conviction of the innocent. Note, "Developments in the Law, Discovery," 74 Harv.L.Rev. 941, 1063 (1961).

2. The government's proposal would also undermine the underlying principle of our adversary system that privacy is vital to the preparatory efforts of the defense team and is a necessary corollary of effective representation. *See Hickman v. Taylor*, 392 U.S. 495. The knowledge that the defense may provide information in its investigative reports to the government will undermine the relationship of trust and confidence between attorney and client, and inhibit vigorous investigation of cases. The resulting inability of the defense to gather and sift all the facts will result in neglected defenses and unnecessary trials.

In a criminal case, the Sixth Amendment right to effective assistance of counsel provides a shield of confidentiality for the communications of the defense team against governmental intrusion. *See generally, Hoffa v. United States*, 385 U.S. 293, 305-7. The work product doctrine also prohibited the discovery of any

part of these reports. Although developed in the context of civil cases, the interest supporting the doctrine – enabling the defense to prepare in private – is even more compelling in the context of criminal cases where liberty is at stake and where, as the ABA has recognized, the difficulties of establishing a relationship of trust and confidence with a client are particularly severe. *See Hickman v. Taylor, supra.* ABA Standards, The Defense Function, § 2.3 pp. 197-98 (App. Draft 1971)

3. The court of appeals correctly held that respondent's Fifth Amendment privilege against self-incrimination was violated when he was ordered to disclose portions of John Bond's reports. These documents were "communicative or testimonial" within the meaning of the privilege because they reflected the thought processes of respondent's agent and their production would subject respondent to the "cruel trilemma of self-accusation, perjury, or contempt . . ." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55.

Unquestionably, petitioner was "compelled" within the meaning of the privilege since he paid a double price for the exercise of the privilege: not only did he forego his Sixth Amendment right to compel the production of a witness in his own behalf who would have completed impeachment of the eyewitnesses, but he suffered irreparable prejudice when the prosecutor called the jury's attention to respondent's failure to produce that testimony. *Simmons v. United States* 390 U.S. 377, 392.

The privilege applies to any documents that might form a "link in the chain" of evidence against the accused (*Hoffman v. United States*, 341 U.S. 479, 486),

even if the government obtains the documents after the close of its case in chief, since the government could utilize the evidence during reopening of its case, as ammunition for cross-examination, during rebuttal, or at a new trial.

4. The court's preclusion of the testimony of John Bond was an unconstitutional sanction. Respondent was denied the testimony of his most important witness, in violation of his right, pursuant to the Sixth Amendment, to compel the attendance of witnesses. *Washington v. Texas*, 388 U.S. 14, 23. The court's order also deprived respondent of his right to complete the impeachment of the eyewitnesses, guaranteed by the confrontation clause of the Sixth Amendment. *See Alford v. United States*, 282 U.S. 687, 891.

The interests underlying the court's order did not justify infringing these fundamental rights given the availability of less drastic sanctions, the "conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons . . . " (*Washington v. Texas* at 22), and the lack of bad faith on the part of defense counsel who believed he had a valid legal claim of protection to the documents. *Societe Internationale v. Rogers*, 357 U.S. 197.

5. Respondent's right to counter the testimony of the two eyewitnesses was improperly prejudiced in two additional ways.

First, the prosecutor improperly bolstered their testimony throughout the trial and cultivated a false impression of defense irresponsibility by telling the jury that John Bond had not testified because the impeaching statements had never been made, although he was well aware that the court had precluded Bond

from testifying. Second, respondent was not permitted to call his expert in eyewitness identification although the expert's testimony would have appreciably aided the jury.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ORDERING DEFENSE COUNSEL TO DISCLOSE TO THE GOVERNMENT RELEVANT PORTIONS OF THE DEFENSE INVESTIGATOR'S REPORTS, AND COMPOUNDED ITS ERROR BY PRECLUDING THE INVESTIGATOR FROM TESTIFYING.

A. THE RULES GOVERNING DISCLOSURE OF DOCUMENTS PROHIBIT GOVERNMENT INSPECTION OF A DEFENSE INVESTIGATOR'S REPORT AT ANY TIME

Essentially, this case deals with the rules of evidence which apply during a criminal trial, and with the mistake made by a trial judge in the interpretation of these rules. The decision of the Court of Appeals was an exercise of its supervisory powers to correct such a ruling.

Forced production of any part of a defense investigator's reports of his interviews with government witnesses is clearly prohibited by the statutory scheme consisting of the Federal Rules of Criminal Procedure and the Jencks Act. See *United States v. Nobles* [Pet.

App.17a]. *United States v. Wright*, 489 F.2d 1181, 1191-2 (C.A.D.C.). The common law rules of evidence in effect at the time of trial and the new Federal Rules of Evidence complement this statutory scheme and implicitly forbid the production of these reports.

1. The Statutory Scheme Consisting Of Rule 16 Of The Federal Rules Of Criminal Procedure As Modified By 18 U.S.C. §3500 Specifically Prohibited The Court From Ordering Production Of These Documents

The Court of Appeals held correctly that the Federal Rules of Criminal Procedure specifically forbid discovery of a defense investigator's reports at any time. [Pet. App. 17a] Rule 16(c) prohibits the,

> "... discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

Thus, reports of defense investigator John Bond to the attorney concerning his interviews were immunized from discovery, both because: 1) they are "internal defense documents", and 2) they are "statements made by ... government ... witnesses ... to the defendant['s] ... agents." *See United States v. Wright*, 489 F.2d 1181, 1191 (C.A.D.C.). These provisions remain unchanged in the Proposed Amendments to the Rules. See Proposed Rule Fed. R.Crim. P. 16(b) (2), 62 F.R.D. 306.

Petitioner claims that Rule 16 applies only to pre-trial discovery. [Pet. br. 62] However, the language of the rule itself, the policy interests involved, and the decisions of courts which have considered the problem, demonstrate that Rule 16 also applies during the trial. Subsection (b) of Rule 16 provides, in pertinent part, that:

> "This rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government *except as provided in* 18 U.S.C. § 3500. [Jencks Act] (emphasis added)

The court of appeals reasonably concluded,

> "Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c). We would conclude that the work product of defense is inviolable in these circumstances. [footnote omitted] *See also, United States v. Wright*, 489 F.2d 1181, 1189-1190 (D.C. Cir.)" (emphasis in original) [Pet. App. 17a].

The proposed amendments to the Federal Rules of Criminal Procedure leave this subsection substantially unchanged. Proposed Rules 16(a) (2), (b) (2), Fed. R. Crim. P., 62 F.R.D. 305-6.

Unquestionably, Rule 16 contemplates and encourages pretrial discovery motions, but subsection (f), relied on by petitioner, does not forbid discovery motions under Rule 16 at trial. Moreover, a party's continuing duty to disclose under Subsection (g) persists "during trial."[7]

Those courts which have dealt with the question of whether the rules set guidelines for discovery during trial have answered in the affirmative. *See United States v. Nobles* [Pet. App. 1a]; *United States v. Wright*, 489, F.2d 1181, 1191 (C.A.D.C.).[8]

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[7] In addition, petitioner is mistaken in concluding that because 16(c) provides that the government may only inspect material "which the defendant intends to produce at trial," the rulemakers must have been concerned solely with pretrial procedure. [Pet. br. 62-3] Petitioner's reasoning is based on the faulty premise that discovery of material during a trial, which the defense intends to produce at trial, would never be helpful to the government. On the contrary, discovery of defense material during trial, prior to the time the defense actually utilizes the material, may be very useful to the government. Consequently, a government motion for discovery at trial may be appropriate, and any such motion shall be subject to the specific limitations on discovery of defense documents set forth in Rule 16(c).

[8] *See Indiviglio v. United States*, 249 F.2d 549, 556 (5th Cir.); *Smith v. United States*, 312 F.2d 867, 869 (C.A.D.C.) *Cf. Giles v. Maryland*, 386 U.S. 66, 102, 117-18 (1967) (*Harlan, J. dis.*) In *Indiviglio, supra*, the court stated,

"...Rule 16 was intended primarily to cover discovery and inspection before the beginning of the trial. But it is generally accepted that its civil counterpart (Fed. Rules of Civil Procedure Rule 34, 28 U.S.C.A.), couched in similar language—neither providing any time limit—may be utilized during the course of trial, 4 Moore's Federal Practice, Second Edition, pp. 2440, et seq. *United States v. Smith*, 117 F.2d 911 (9th Cir.). There is

In regard to protecting the inviolability of internal defense documents, policy considerations are the same during trial as they are prior to trial. Discovery of defense investigators' reports at any time would be inconsistent with the fundamental principle of our accusatorial system of justice, that the government "shoulder the entire load" of proof. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55; *United States v. Wright*, 489 F.2d at 1195. The defendant has no obligation to assist the government in making its case. *See Levin v. Katzenbach*, 363 F.2d 287, 295 (C.A.D.C.) (Burger, J., dissenting).

The government, on the other hand, not only "prosecutes an accused [but] also has the duty to see that justice is done . . . ." *United States v. Reynolds*, 345 U.S. 1, 12. Therefore, " . . . it [would be] unconscionable to allow it to undertake prosecution and then invoke its . . . privileges to deprive the accused of anything which might be material to his defense. . . . " *Id.*, 345 U.S. 1, 12; Thus the government must provide exculpatory material to defendants. *Brady v. Maryland*, 373 U.S. 83, 87. The Jencks Act also is

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every reason to hold the same thing with respect to Rule 16." 249 F.2d at 556.

Petitioner is mistaken in stating that the "commentators are in agreement that Rule 16 is directed *only* at the pretrial situation." [Emphasis added] Pet. Br. at 63, n.26. Two of the three commentators cited by petitioner do not state this proposition or concern themselves with the issue. Nakell, "Criminal Discovery for the Defense and the Prosecution - The Developing Constitutional Considerations, 50 N.C.L. Rev. 437, 494-514 (1972); Note, "Prosecutorial Discovery Under Proposed Rule 16," 85 Harv. L. Rev. 994 (1972).

part of that duty. Consequently, inequality of discovery is not only compatible with, but required by, the fundamental philosophy of our criminal system, and "any suggestion that the state must have at least as good a chance as the defendant to prevail would seem to violate the traditional policy of favoring the defendant in order to avoid conviction of the innocent." Note, "Developments in the Law, Discovery", 74 Harv. L. Rev. 940, 1063 (1961). Consistent with this philosophy, the Advisory Committee was careful in framing Rule 16 not to expand the government's right to discovery to the same degree that it expanded the defense right.[9] The Jencks Act, 18

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[9]The 1966 revision of the Rules represented a break with the established policy of non-disclosure by the defendant. Before enactment of Rule 16, a practice of non-disclosure on both sides had been customary. *United States v. Hughes*, 413 F.2d 1244, 1249 (5th Cir. 1969). At the time Rule 16 was first recommended in 1944, it was thought doubtful that the law allowed any discovery in a criminal case. 1 C. Wright, *Federal Practice and Procedure*, §251 at 490. It was not until 1966, that Rule 16 was amended to give any discovery powers to the prosecution, and even then the government was granted only "a limited right of discovery under certain circumstances." *Wright, supra*, at 492. Even this minor change was opposed by two members of the Court. Justice Black wrote a vigorous dissent in which he warned, ". . .some of the proposed rules go to the very borderline if they do not acutally transgress the constitutional right of a defendant not to be compelled to be a witness against himself." Order of February 28, 1966 Amending Criminal Rules, 383 U.S. 1032 (1966).

Pursuant to Rule 16, the government is entitled to discover only material defendant intends to produce at trial. There is no such restriction on defense discovery of government material. In addition, the government, not the defense, is subject to

U.S.C. § 3500, is consistent with the traditional policy of protecting the accused reflected in Rule 16. Section 3500 expands the statutory discovery rights of defendants to include the right to statements of government witnesses after they have testified on direct examination. The Jencks Act provides for no reciprocal right of the government to discover statements of defense witnesses in defense files at any time. Absent any statutory compulsion similar to § 3500, the exclusive terms of § 3500 indicate that a court has no authority to require the defendant to surrender statements of witnesses to the government.[10]

2. Neither The Common Law Rules Of Evidence Nor The New Federal Rules Of Evidence Provide For Or Authorize The Discovery Of Any Part Of These Reports.

The common law rules of evidence and the new Federal Rules of Evidence, which will govern at any

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disclosure provisions of the Jencks Act. The proposed amendments retain these restrictions on governmental discovery. Proposed Rule 16(a)(1), (a)(2), (b)(1), (b)(2), 62 F.R.D. 305-306. Rule 16, as presently worded, makes discovery by the government conditional on defense discovery. There is no reciprocal provision. *See* Rezneck, "The New Federal Rules of Criminal Procedure", 54 Geo. L. J. 1276 (1966).

[10]The legislative history of the Jencks Act reveals this language in S. Rep. No. 981, 85th Cong. 1st Sess. (1957):

> "The purpose of the proposed legislation is to amend chapter 223, title 18 U.S.C. to provide the *exclusive* procedure for handling demands for the production of statements and reports of witnesses." (emphasis added)

In interpreting §3500, this Court emphasized that it is the exclusive authority by which disclosure during trial may be

trial after July 1, 1975, define probative evidence and the restrictions on its use. Ancillary rules provide a narrow set of circumstances under which a document not produced at trial must be shown to the opposing party. Neither the common law nor the new Federal Rules provide for or authorize the discovery of these documents.

(a) Petitioner discusses the possibility that John Bond refreshed his recollection by reading the reports. That issue is not present in this case. As the court of appeals found, there is absolutely no evidence in the record that John Bond refreshed his recollection (Pet. App. 15a, n.4); the possibility was neither raised nor discussed by either the prosecutor or the trial judge. In fact, petitioner's proposal would, as the court in *Wright* noted, modify the rules of evidence by "doing away with the requirement that the statement be used to refresh recollection either before or while testifying." *United States v. Wright*, 484 F.2d 1181, 1191 (C.A.D.C.)

(b) Petitioner also urges that Rule 613(a) of the new Federal Rules of Evidence would require, at a new trial, that if defense counsel cross-examines the eyewitnesses as in the first trial, he show opposing counsel portions of John Bond's report containing their statements.

Petitioner is mistaken. Rule 613 would no more permit such discovery then would the common law upon which it was based. The common law requirement

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compelled: "...statements of a government witness made to an agent of the government which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all." *Palermo v. United States*, 360 U.S. 343, 351.

known as the Rule of The Queen's Case would require counsel to show the eyewitnesses any statement written or signed by them during cross-examination about the writings.[11] No such statements were in the possession of the defense. The rule does not require production of a report written by a third person (the investigator) and not signed by the eyewitnesses.

A second reason the rule would not require production of these documents is that the witnesses were not being cross-examined about a writing of any kind, much less one they wrote or signed. Instead the cross-examination focused on their *oral* statements to John Bond.

The Advisory Committee Note makes it clear that Rule 613(a) was intended to eliminate the common law requirement that a document written or signed by the witness be shown to him, because the rule constitutes a needless obstruction to cross-examination by warning the witness that the questioner possesses a document he has written which may be inconsistent with his testimony.[12] The common law rule also confuses "the principles applicable to the best evidence rule with principles applicable to cross-examination," by forcing

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[11]The commentators cited by the Federal Rules of Evidence Advisory Committee all agree with this interpretation of the common law rule. Ladd, "Some Observations on Credibility: Impeachment of Witness," 52 Cornell L.Q. 239, 246-247 (1967); McCormick, *Handbook of the Law of Evidence*, §28 (1st ed. 1954); 4 Wigmore, *Evidence* §1259-1260, (Chadbourn Rev. 1972); Advisory Committee Note to Rule 613, Fed. R. Evid., 56 F.R.D. 278-279.

[12]See Schmertz, *Proposed Federal Rules of Evidence*, editor's Introduction and Commentary, p. 16 (Callaghan & Co., 1974).

counsel to produce a document before he is ready to introduce it into evidence. Ladd, "Some Observations on Credibility: Impeachment of Witnesses," 52 Cornell L.Q. 239, 246-247 (1967).

Rule 613(a) provides that

> "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel." 56 F.R.D. 278.

Rule 613(a) requires that documents written or signed by the witness be "shown" to opposing counsel, not to the witness. It also provides that oral statements be "disclosed" to opposing counsel. Thus, defense counsel in this case would comply with the requirement by explaining to opposing counsel the "contents" of the oral statements to John Bond. The purpose of the requirement is to "protect against unwarranted insinuations," the theory being that an attorney who might be willing to insinuate through a question that the witness made a particular statement, would not be willing to actually lie to opposing counsel and fabricate a prior inconsistent statement. See Advisory Committee Note to Rule 613(a) Fed. R. Evid., 56 F.R.D. 278. Of course, the protection against an "unwarranted insinuation" is complete when, as here, the defense is able to produce a witness, John Bond, who heard the prior inconsistent statement and is willing to testify to it.

(c) The rules of evidence in no way modify the protection given these documents by Rule 16 of the Federal Rules of Criminal Procedure. The conclusion of the court of appeals in *Wright* is applicable to this case:

"With respect to issues touched on by the government's proposal, primary responsibility for development of the law has been assumed by Congress and the rulemakers. No doubt, there always remains room for case-by-case development of the law—to fill gaps in a statute or rule, to solve problems not considered by the draftsmen, or to interpret text in a manner which achieves substantial justice. The government's proposal, however, works a major change in procedure. Depending on one's perspective, it would expand or narrow the specific rights and privileges granted by statute and by rule, and would be in conflict with the plain language of these provisions. *Cf. Palermo v. United States*, 360 U.S. 343, 78 S.Ct. 1217, 3L.Ed. 2d 1287 (1959)." *United States v. Wright*, 489 F.2d 1181, 1192 (C.A.D.C.).

The potential significance of this violation of traditional trial procedure justified defense counsel's action in refusing to disclose the relevant portions of the reports, despite the fact that they corroborated the offer of proof as to John Bond's testimony. (See n.6, *supra*).

B. THE COURT'S ORDER IMPROPERLY INVADED CONFIDENTIAL COMMUNICATIONS OF THE DEFENSE TEAM

1. The Ability of Defense Attorneys, Particularly Appointed Counsel, Adequately To Represent Their Clients Will Be Jeopardized If Portions Of Investigator's Reports Are Made Available To The Government For Impeachment Purposes

Theoretically, an adversary system demands that prosecution and defense be equally strong. In reality,

however, the defense has traditionally been weaker. One reason for this imbalance is the inherent advantages possessed by the government in the preparation of a criminal case.[13]

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[13]This Court in *Wardius v. Oregon*, 412 U.S. 470, 475, n.9 noted the State's "inherent information gathering advantages", and quoted a commentator: "Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various non-testimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018-1019 (1972) (footnotes omitted). *See* Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1150, 1173 (1960); Nakell, "Criminal Discovery for the Defense and the Prosecution–The Developing Constitutional Considerations," 50 N. Car. L. Rev. 437 (1972); Brennan, "The

Another primary reason for the imbalance has been the relative ineffectiveness of legal assistance provided the accused in the past.[14] In recent years, concern has led to a higher quality of representation for indigent defendants, but the government's proposal would undermine this development, and further contribute to a system already weighted against the defendant in two respects: 1) it would impair the relationship of trust and confidence between client and attorney and 2) it would inhibit investigators and other members of the defense team from gathering all facts both favorable and unfavorable.

A relationship of trust and confidence between an attorney and his client is the cornerstone of a strong system of criminal justice. American Bar Association Standards admonish defense attorneys to create such a relationship. ABA Standards, The Defense Function, § 3.1(a) (1971). At the same time, the ABA recognizes the special obstacles to the creation of such a relationship in criminal, as opposed to civil, cases. ABA

Criminal Prosecution: Sporting Event or Quest for Truth?" 1963 Wash. U.L.Q. 279 (1963).

The length of time between the alleged crime and the filing of charges allows the memory of the defendant to dim making it difficult for him to retrace his movements. This problem is particularly severe for the unemployed who live relatively unstructured lives and who cannot establish their whereabouts by utilizing business records. The fact that these individuals may lack education and are inarticulate makes the verification of their innocence more difficult. Such individuals constitute a large number of those represented by public defender offices. Finally "Jurors doubtless tend to believe that most indicted persons are guilty, no matter how strongly they are warned otherwise. . ." Friendly, "The Fifth Amendment Tomorrow and the Case for Constitutional Change," 37 U. Cinn. L. Rev. 671, (1968).

[14]See, Bazelon, "The Defective Assistance of Counsel," 42 U. Cinn. L. Rev. 1, 6 (1973).

Standards, The Defense Function, § 2.3 pp. 197-98 (Approved Draft 1971).

When a public defender or other appointed counsel represents a client, the problem is even more severe. Studies show that defendants have a tendency to "regard the public defender as an arm of the state working closely with the prosecutor." *People v. Canfield*, 12 Cal. 3d 699, 705, 117 Cal. Rptr. 81, 85.[15]

Suspicion will only be intensified when a defendant observes his attorney providing the government with information from the reports of his defense investigator. The result will be unwillingness on the part of the client to be candid with his attorney. *See People v. Canfield*, 12 Cal. 3d 699, 705, 117 Cal. Rptr. 81, 85.

Vigorous investigation and effective communication among members of the defense camp will also be negatively affected by the proposed rule.[16] It will

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[15]See Wilkerson, "Public Defenders as Their Clients See Them", 1 Am. J. Crim. L. 141, 144 (1972); Casper, *Criminal Justice–The Consumers' Perspective* 23-9 (U.S. Dept. of Justice, 1972); ABA Standards, The Defense Function §2.3, p.198 (Approved Draft 1971) Medalie, Zeitz & Alexander, "Custodial Police Interrogation in Our National's Capital: The Attempt to Implement Miranda," 66 Mich. L. Rev. 1347, 1378 (1968); Comment, "Interrogations in New Haven: The Impact of Miranda," 76 Yale L.J. 1519, 1605 n.244 (1967).

[16]One of the most important assets of a strong public defender office is a permanent staff of full-time investigators who fulfill a number of purposes: (1) they free the attorney's time for necessary legal tasks; (2) for tactical reasons, it may be important that the attorney does not confront the witness until trial; (3) in addition, if impeachment by prior inconsistent statements become necessary, an investigator, not the attorney, should testify, since ethical considerations would require the attorney to withdraw from the case before taking the stand to

encourage the investigator to stop writing reports, or to censor and tailor them so as not to contain information damaging to the defendant.[17] Equally important, fear of eliciting damaging information may inhibit the investigator from conducting thorough interviews, needed to evaluate and to prepare his case. Defense counsel will be unable to bargain effectively with the prosecution, or to intelligently advise his client either to accept a plea bargain or to go to trial. Cross-examination will also suffer.[18] In addition, ignorance about defense witnesses and about government witnesses' version of the case will make difficult the tasks of presenting the best defense witnesses and eliciting from them the most pertinent information.

Cases will be brought to trial that would have been disposed of earlier had the facts been known to the defense attorney. Valuable defenses will be neglected. Trials will be full of surprises for defense counsel causing delays and resulting in inadequate representa-

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impeach the witness. ABA Standards Relating to the Administration of Criminal Justice, Compilation, p.126 (1974). *See also*, Freeman, "The Public Defender System", J. Amer. Ind. Soc. 74, 76 (1948); Beany, The Right To Counsel in American Courts, 220 (1955).

[17]Memorializing interviews is viewed as essential to effective trial preparation. Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases Federal and State*, 57 (1970); Amsterdam, Segal and Miller, *Trial Manual for the Defense of Criminal Cases II*, 2-92 (1971).

[18]Necessary preparation for cross-examination requires a complete understanding of the case, the witness' background, his interest in the case, his prejudices, his relation to the parties and counsel, and his prior statements about the case. See L. Friedman, *Essentials of Cross-Examination*, 16 (1968).

tion of defendants. ABA Standards, The Defense Function, § 3.1(a), p. 201 (Approved Draft 1971).

In the instant case, the trial court offered to examine the documents in camera in order to excise irrelevant material. [App. 33] Such a procedure only adds to the problem. A judge should not be privy to material in the defense files which may be damaging to the defendant. It may affect his ability to decide a motion for judgment of acquittal; he may not be able to resist entering upon a line of questioning that would bring out the information he believes important; and finally, it may affect his attitude at the sentencing of a defendant, in the event of a conviction.

Petitioner argues that disclosure of relevant portions of these documents will aid the search for truth. In fact, the interest in truth will not be advanced materially by this proposal. An honest investigator will ordinarily include in his report impeaching statements. A dishonest investigator, such as petitioner is seeking, will just as likely misstate the interview in his report as on the stand under oath.[19] Petitioner's proposal severely undermines the fundamental interest of our adversary system in ensuring the confidentiality necessary for effective preparation of an accused's case. The right to effective assistance of counsel under the Sixth Amendment and the common law doctrine of work product guarantees confidentiality in this case.

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[19]Contrary to petitioner's implied assertions defense counsel may not under any circumstances knowingly offer false evidence. ABA Standards, Defense Function §7.5(a) (1971). (See Pet. br. 27).

2. A Shield Of Confidentiality Is Part Of The Sixth Amendment Right To Counsel.

The Sixth Amendment entitles a defendant to the effective assistance of counsel "at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 70; *Glasser v. United States*, 315 U.S. 60, 76. Included in the concept of effective assistance of counsel is the presumption that counsel will investigate a case thoroughly and will interview both defense and government witnesses.[20]

Clearly the defense attorney, to carry out these obligations, must work with investigators. They conduct interviews and transmit information and their analysis of it to the attorney. The effective preparation of the defense case requires freedom of communication among members of the defense team. Only if a cloak of confidentiality is placed around them will the gathering of facts and concomitant communication and analysis of them be such as to assure the client effective representation.

As a consequence, the Sixth Amendment is violated when the government becomes privileged to internal

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[20]*See Powell v. Alabama, supra* at 58; *Griffin v. Illinois*, 351 U.S. 12, 17; *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) *cert. denied*, 393 U.S. 849; *United States v. Germany*, 32 F.R.D. 421 (M.D. Ala.); *In Re Terkeltoub*, 256 F.Supp. 683, 685 (S.D.N.Y.). *See also United States v. DeCostor*, 487 F.2d 1197, 1203 (C.A.D.C.); ABA Standards Relating to the Administration of Criminal Justice, Compilation, pp. 125, 148 (1974); Criminal Justice Act of 1964, 18 U.S.C. §3006A (1964), as amended, 18 U.S.C. §3006A (Supp. 1972); Note, "Effective Assistance of Counsel for the Indigent Defendant," 78 Harv. L. Rev. 1434, 1438 (1965).

communications of the defense camp. The Sixth Amendment guarantees to a defendant the right to have his investigator and attorney discuss and write reports about interviews of witnesses without running the risk that the government will overhear the conversations or read the reports. *In Re Terkeltoub*, 256 F.Supp. 683, 685 (S.D. N.Y.) citing *Caldwell v. United States*, 205 F.2d 879, *cert. denied* 349 U.S. 930. *See Hoffa v. United States*, 385 U.S. 293, 305-7; *United States v. Kasmir*, 499 F.2d 444, 453 (5th Cir.).

The court in *In Re Terkeltoub, supra*, outlined the Sixth Amendment veil of privacy behind which the government may not go. "At the heart of the job of thorough going investigation and preparation is the interviewing of prospective witnesses, hostile as well as friendly. Because privacy is so vital to these preparatory efforts, the prosecution is forbidden to eavesdrop or plant agents to hear the counsel of the defense." (citations omitted) 256 F.Supp. at 685.

As in the present instance, *Terkeltoub* involved a government attempt, through court order, to have defense counsel reveal the contents of an interview with a witness.[21] The Court, while recognizing there was no surreptitious invasion by an informer, labeled the prosecution effort a "secret intrusion" and emphasized that "the ultimate interest to be protected is the

[21]The defense attorney was subpoenaed to answer questions about a meeting being held with his client and a prospective government witness during the preparatory stages of a case. The witness subsequently reported to the prosecution that the other two participants urged him to commit perjury. *Id.* at 683.

privacy and confidentiality of the lawyer's work in preparing the case." *Id.* at 685.[22]

This Court reiterated these principles in *Hoffa v. United States,* 385 U.S. 293. During the "Test Fleet" trial, a government informer infiltrated the defense camp and reported to the government "at least some of the activities of defense counsel . . . ." *Id.* at 306. The trial ended in a hung jury. The Sixth Amendment issue was raised on appeal from a conviction at a subsequent trial for jury tampering. This Court stated in dicta,

> "The proposition that a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment has found expression in two cases decided by the Court of Appeals for the District of Columbia Circuit, *Caldwell v. United States,* 92 U.S. App. D.C. 355, 205 F.2d 879, and *Coplon v. United States,* 89 U.S. App. D.C. 103, 191 F.2d 749. Both of those cases dealt with government intrusion of the grossest kind upon confidential relationships between the defendant and his counsel. In *Coplon,* the defendant alleged that government agents deliberately intercepted telephone consultations between the defendant and her lawyer before and during trial. In *Caldwell,* the agent, '[i]n his dual capacity as defense assistant and government agent gained free access to the planning of the defense . . . . Neither his dealings with the defense nor his reports to the prosecution were limited to the proposed unlawful acts of the defense: they covered many matters connected with the impending trial." 92 U.S. App. D.C., at 356, 205 F.2d, at 880.

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[22]Since "[t]he testimony sought [dealt] allegedly with a conversation amounting to, or looking toward, the commission of a crime" the reasons for disclosure in *Terkeltoub* were particularly strong. 256 F.Supp. at 684, n.2. *See In Re Grand Jury Proceedings*, 473 F.2d 840, 843 (8th Cir.).

"We may assume that the *Coplon* and *Caldwell* cases were rightly decided, and further assume, without deciding, that the government's activities during the Test Fleet trial were sufficiently similar to what went on in *Coplon* and *Caldwell* to invoke the rule of those decisions. Consequently, if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as Constitutionally defective. *Cf. Black v. United States*, ante, at 26." *Id.* at 306-307.

The gravamen of the violation is not interference with the attorney-client privilege.[23] It is the piercing of the shield of confidentiality which surrounds the preparations of the defense camp.

In *Caldwell*, the informer "gained free access to the planning of the defense." 205 F.2d at 880. He sat in on the attorney's conferences with witnesses, other lawyers and defendant. The court concluded that the Constitution's guarantee of effective assistance of counsel loses its meaning "if the government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisors, to listen to their conversations, and to participate in their counsels of defense." *Id.* at 881.

The guarantee loses just as much meaning if those confidential papers are made available to the govern-

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[23]In *Hoffa*, the activities of defense counsel included not only conversations with his client but interviewing witnesses, and planning the following day's trial strategy. *Id.* at 304. The court assumed that only "some" of these activities were reported by the informer, indicating that for Sixth Amendment purposes it was not differentiating among them.

ment by order of the court. The violation of the sanctity of defense preparations is the same. Disclosure of portions of the defense report places the government in the camp of the defense with ears to listen to the interview of the witness by the investigator, and eyes to read portions of the confidential report the investigator wrote the attorney.

These cases teach that when the shield of confidentiality which surrounds the defense camp is pierced, a Sixth Amendment violation occurs regardless of whether or not the defense team's preparations were adversely affected. *Hoffa v. United States*, 385 U.S. at 307, *Coplon v. United States*, 191 F.2d at 759; *Caldwell v. United States*, 205 F.2d at 881.

However, as noted in the preceding section of this brief, the government's proposal in fact will have a detrimental impact on the representation afforded defendants.

3. The Work Product Doctrine, Established to Ensure Effective Representation of Clients, Protects the Investigator's Reports from Enforced Production.

The work product doctrine is another means by which the law protects confidential communications of the defense team. The basis on which the doctrine rests is the same as that of the Sixth Amendment shield, and was clearly outlined by this Court in *Hickman v. Taylor*, 329 U.S. 495, 510-11. An attorney's obligation to faithfully represent his client requires that the attorney and his staff work in "privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* Only then can he assemble the necessary

information and competently prepare the case. *Id.* Consequently, the law places a shield of confidentiality around "interviews, statements, memoranda . . . [and] mental impressions" of the defense team. *Id.* at 511.

The relevant portions of the investigator's report constituted defense counsel's work product. As in *Hickman*, production of an oral statement memorialized in an investigator's report was sought. Although *Hickman* involved pretrial discovery, the policy considerations upon which the doctrine rests are just as applicable to discovery during trial.[24]

The court of appeals recognized in this case that although the "policies supporting protection of an attorney's work product [have been] stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. Pet. App. 16a, n.5 quoting from Annot. 35 A.L.R. 3d 412, 424 (1971)." *In Re Grand Jury Proceedings, Duffy v. United States*, 473 F.2d 840, 846 (8th Cir.).[25] The need for effective

[24]The work product doctrine was not tied to the specific rules involved in the controversy in *Hickman*, but are "well recognized and . . . essential to an orderly working of our system of legal procedure." Id. at 512.

[25]The United States Court of Appeals for the 8th Circuit has stated, "There is 'an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases.'" Annot. 35 A.L.R. 3d 412, 424 (1971). *In Re Grand Jury Proceedings, Duffy v. United States*, 473 F.2d 840, 846 (8th Cir.); (*See e.g. State v. Bowen*, 104 Ariz. 138, 449 P.2d 603; *State v. Superior Court*, 99 Ariz. 382, 409 P.2d 547; *Fisher v. State*, 241 Ark. 545, 408 S.W.2d 894; *Edens v. State*, 235 Ark. 178, 359 S.W.2d 432; *People v. Boehm*, 270 Cal. App.2d 13, 75 Cal. Rptr. 590; *Urga v. State*, 85 So.2d 629, 630; *Whitaker v. Blackburn*, 74 So.2d 749, 795-96; *See also*, Comment, "'Work Product' in Criminal Discovery," 1966 Wash. U.L.Q. 321 (1966)).

representation is more important in a criminal case because the liberty of the defendant is at stake. Moreover, if its protections are not available, the tenuous relationship between appointed counsel and indigent client may quickly deteriorate. (*See pages* 25-7, supra).

The Court in *Hickman* noted that work product is not discoverable except in a "rare" situation where there has been a showing of necessity or a claim that undue prejudice to the preparation or conduct of a petitioner's case would result . . . . *Id.* at 513.

However, the privilege given to "the oral statements made by witnesses" as opposed to statements they have written or signed is absolute.[26] Even if a conditional privilege would be applicable to these documents in a civil proceeding, in a criminal case the guidelines must be more stringent. *See, In Re Terkeltoub,* 256 F.Supp. 683, 686 (S.D.N.Y.). That standard should be the one reflected in Rule 16 of the Federal Rules of Criminal Procedure, which unqualifiedly excludes from discovery investigators' reports of interviews with government witnesses.

Moreover, "[g]enerally, if a witness is available to the party seeking discovery of his statement to opposing counsel, such discovery should not be allowed." Annot. 35 A.L.R. 3d 412, 470 (1971); *See Hickman v. Taylor, supra* at 508; *In Re Grand Jury*

[26]"Thus, as to such oral statements, the Court said, 'we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.' " *Hickman v. Taylor, supra* at 512. C. Wright, *Law of Federal Courts,* § 82 at 362 (2d Ed. 1970) (footnotes omitted); *In Re Grand Jury Proceedings,* 473 F.2d 840, 848 (8th Cir.).

Proceedings, 473 F.2d 840, 849 (8th Cir.). Here the witnesses who allegedly lied were the government's own witnesses. They had already testified for the government and could have been called again in rebuttal. The investigator intended to take the stand and would have been subject to complete cross-examination including impeachment by any legal means. *See Hickman v. Taylor, supra* at 508. Finally, there is no showing in this case that the government made any attempt to interview the investigator prior to the defense case or that it sought a continuance to interview him.

The important interest upon which the work product doctrine is based requires its application to investigators' reports in a criminal case. As this Court has already recognized,

> "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Hickman v. Taylor*, 329 U.S. 495, 511.

C. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT'S ORDER VIOLATED RESPONDENT'S PRIVILEGE AGAINST SELF-INCRIMINATION

1. The Document Was Personal To Respondent And Testimonial Within The Meaning Of The Privilege Against Self-Incrimination.

The court of appeals found correctly that the Fifth Amendment's privilege against self-incrimination prohibited government discovery of portions of the defense investigator's report (Pet. br. 14a). *See United States v. Wright*, 489 F.2d 1181, 1195 (C.A.D.C.).

The Fifth Amendment protects the accused from "being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . ." *Schmerber v. California*, 384 U.S. 757, 761.

Relying on the distinction set forth in *Schmerber v. California, supra* at 764, petitioner claims that the reports are not communicative or testimonial. [Pet. br. 46-7]. The reports, however, are not a source of "real or physical evidence", such as a blood test or police lineup. *Schmerber v. California, supra; Gilbert v. California*, 388 U.S. 263, 270; *United States v. Wade*, 388 U.S. 218, 222. Instead, the prosecutor "intended to rely on [their] substantive content for evidence or leads, rather than upon some physical attribute of the paper or writing." Note, "Prosecutorial Discovery Under Proposed Rule 16," 85 Harv. L. Rev. 994, 1003 (1972).

The relevant portions of the report reflect the thought processes of the investigator on several levels. First, he selected and analyzed the material in his

reports. In addition, his mental efforts contributed to the interview itself, including the wording of his questions, the framework within which they were asked, and the general mood of the interview.[27] Thus, contrary to petitioner's assertion, the writings sought were materially different from a "tape recording of the interview or from purely physical evidence that may have been uncovered by Bond in the course of the investigation." [Pet. br. 47].

Petitioner claims that even if the portions of the report might be testimonial "... as applied to a claim of privilege by Bond, the report cannot be considered 'testimonial' in connection with respondent's claim." *Id.*

"The privilege protects the individual from any disclosure, in the form of oral testimony, documents, or chattels, sought by legal process against him as a witness." *United States v. White*, 322 U.S. 694, 699. "Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." *Wilson v. United States*, 221 U.S. 361, 378.[28]

The testimonial disclosure implicit in documents which do not include a defendant's statements is the "witness' assurance compelled as an incident of the process, that the articles produced are the ones demanded...." 8 Wigmore, *Evidence* § 2264 at 380

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[27]Insofar as the investigator is influenced by conferences with the attorney prior to the interview, the attorney's thought processes also contribute to the results.

[28]*Boyd v. United States*, 116 U.S. 616, 638; Mansfield, "The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information." 1966 The Supreme Court Review 103, 127.

(McNaughton Rev. 1961). One of the underlying policies of the privilege as defined by this Court is "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt. . . ." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55. This "trilemma" is faced whenever the government forces a defendant to produce a document, regardless of whether the document contains his statements or the statements of other witnesses.[29]

Petitioner has confused the requirement that the documents be held in a "personal capacity" with the requirement that they be "testimonial" or "communicative". Although the defendant works through his attorney and investigators, they are his agents and

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[29]"He can produce the sought after document, thereby implicitly stating that the document produced is the one requested, and provide evidence against himself. He can perjure himself in two ways: he can refuse production on the ground that he does not have the requested item, or he can produce something other than the document requested – for example, a forged non-incriminating version of the document. Or he can simply refuse production and subject himself to a contempt sanction. Compelled production of a document in the possession of the defendant, whether or not it is a document written by the defendant, thus involves a "communicative act" by the defendant within the protection of the privilege. '[I]t is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit.' *Couch v. United States, supra*, 409 U.S. at 330 n.12, 93 S.Ct. at 617 quoting *United States v. Cohen*, 9th Cir. 338 F.2d 464, 468 (1967) *United States v. Wright*, 489 F.2d 1181, 1193-4, n.15 (D.C. Cir. 1973). See also, *United States v. White*, 322 U.S. 694, 699; *In Re Grant*, 198 F.708, 709 (S.D.N.Y.) (Hand, J.); affirmed. 227 U.S. 74.

extensions of him. *United States v. Judson,* 322 F.2d 460, 467 (9th Cir.); 8 Wigmore, *Evidence,* §§2270, 2307 (McNaughton Rev. 1961). Moreover, they all share a "pre-existing relationship of confidentiality." *Bellis v. United States,* 417 U.S. 85, 101. As a consequence, respondent had rightful possession of the documents in a "purely personal capacity", instead of in a "representative" capacity on behalf of a "collective entity" such as a corporation or partnership. *Bellis v. United States,* 417 U.S. 85, 88, 90. *United States v. White,* 322 U.S. 85, 88, 90; See *Couch v. United States,* 409 U.S. 322, 335.

Although not required by the claim of privilege, the report must be viewed in the same light as if respondent himself had written it. Otherwise, an intolerable tension arises between respondent's Fifth Amendment right and his right to counsel under the Sixth Amendment. A defendant who is not represented by an attorney may himself investigate the case and prepare his own investigative reports. If these reports are shielded from discovery by the privilege against self-incrimination, but those of a defendant receiving the traditional benefits of counsel are not so protected, the defendant represented by counsel is penalized. The unconstitutional tension is created when respondent is forced to choose whether to forego benefit of counsel in order to protect documents by asserting his Fifth Amendment privilege, or to make his documents vulnerable to perusal by the prosecution in order to have the benefit of counsel. *See Simmons v. United States,* 390 U.S. 377, 392.

2. Respondent Was "Compelled" To Disclose The Contents Of The Report Within The Meaning Of The Fifth Amendment; At No Time Did He Waive His Privilege Against Self-Incrimination.

Although the court's order forced respondent to choose between surrendering of the report and presentation of the testimony of his major witness, the government suggests there was no "compulsion" in the instant case. Where the choice, as here is, " 'between the rock and the whirlpool', duress is inherent in the decision to 'waive' one or the other". *Garrity v. New Jersey*, 385 U.S. 493, 498. Compulsion was particularly serious in this case because petitioner was forced to choose between the exercise of his Fifth Amendment right to silence on the one hand, or his Sixth Amendment rights to compulsory process of defense witnesses and confrontation of government witnesses. *See* pp. 49-52 *infra*. Such a choice was condemned in *Simmons v. United States*, 390 U.S. 377, when this court concluded, ". . . we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

This court traditionally has been solicitous about the Fifth Amendment rights of defendants and has refused to allow the government to obviate those rights by indirection and manipulation.[30] In this case, respondent

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[30] *Boyd v. United States*, 116 U.S. 616, 634 (1886) (in a civil forfeiture action, court would not condone the choice between producing a document or forfeiting his goods); *Slochower v. Board of Education*, 350 U.S. 551, 559 (public school teacher cannot be discharged merely because he invoked Fifth Amendment); *Garrity v. New Jersey*, *supra* at 498 (policeman cannot be forced to choose between his job and taking the

paid doubly for exercise of his Fifth Amendment right against self-incrimination. Not only was he forced to forfeit valuable testimony guaranteed him under the Sixth Amendment, but he also suffered irreparable prejudice when the prosecutor called the jury's attention to respondent's failure to produce that testimony.[31]

Petitioner's reliance on this Court's approval of an alibi statute in *Williams v. Florida*, 399 U.S. 78, 82 is misplaced. In *Williams*, the defendant was required to produce, prior to trial, evidence he would have introduced during the trial—the fact that the defense would rely on an alibi and the names of the alibi witnesses. The statute only affected the timing of the disclosure; here respondent never intended to introduce any part of John Bond's report.[32]

Furthermore, the policy reason, avoidance of undue surprise, which justified discovery of the alibi defense and the names of alibi witnesses in *Williams*, is simply

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Fifth); *Spevack v. Klein*, 385 U.S. 511, 516 (attorney cannot be disbarred because he invoked Fifth Amendment protections); *Brooks v. Tennessee*, 406 U.S. 605, 610-611, (rule requiring that defendant be first in order of defense witnesses 'cuts down on the privilege [to remain silent]', *Lefkowitz v. Turley*, 414 U.S. 70, 85 (Waiver of privilege secured under the threat of substantial economic sanction cannot be termed voluntary) *Griffin v. California*, 380 U.S. 609, 614 (comment on a defendant's silence at trial "cuts down on the privilege by making its assertion costly.")

[31]See page 61, infra.

[32]Respondent did not object to revealing the fact that it intended to put on an impeachment witness or the name of that witness.

inapplicable to the discovery of an investigator's report in this situation.[33]

Finally, *Williams* was a case in which the rulemakers had authorized disclosure of alibi witnesses. In the instant case, on the other hand, the rulemakers not only have refused to authorize the discovery of defense investigator reports, they have expressly prohibited such discovery. *See* pp. 13-23 *supra.*

Likewise, the holding in *McGautha v. California,* 402 U.S. 183 offers no support for petitioner's position. There, the petitioner was tried before a jury which determined both his guilt and punishment in one proceeding. The Court analyzed the burdens of a defendant who wants to testify on the issue of punishment, but not on the issue of guilt. This Court rejected petitioner's argument that he had been subjected to an unconstitutional choice proscribed by *Simmons v. United States.* The distinguishing feature in *Simmons,* according to this Court, was that the benefit "to be gained by waiving the Fifth Amendment privilege is that afforded by another provision of the Bill of Rights." *Id.* at 212, quoting *Simmons v. United States,* 390 U.S. 377, 394. Respondent Nobles'

[33]First, the defense never knows whether it will call an impeaching witness until the government witness takes the stand at trial and testifies in a manner which is inconsistent with his prior statement. Second, the benefit to the government derived from an opportunity to investigate an alibi defense is not ordinarily a valid consideration when dealing with impeachment testimony. Such evidence is not susceptible to the kind of on-the-scene investigation which law enforcement officers often conduct when confronted with the contention that defendant was at another place when the crime occurred.

situation is analogous to that of the defendant in *Simmons*, since he could have secured his Sixth Amendment right to present John Bond's testimony by waiving his privilege. The defendant in *McGautha* was in no such position; this Court found his dilemma similar to that of a defendant who by taking the stand subjects himself to the burdens of cross-examination and impeachment. *Id.* at 215. "[I]t is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh the pros and cons in deciding whether to testify." *Id.* at 215. But respondent Nobles' position is quite different. When he chose to exercise his right to remain silent, he was not only prevented from taking the stand himself, but was also forced to forego the testimony of another witness, his investigator.[34]

Petitioner's argument that respondent waived his right to be silent as to the reports by placing the investigator on the stand is mistaken. Respondent never took the stand. If he had an otherwise valid Fifth Amendment claim to the reports, it was not waived merely because he offered the testimony of his investigator who wrote the reports and would testify to related events.

Respondent agrees with the principle relied on by petitioner that if a defendant takes the stand he opens himself to cross-examination. In the instant case, the investigator, not the defendant, took the stand, and the

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[34]Conversely, if respondent had exercised his constitutional right to place the witness on the stand, the court's order would have forced him to surrender his privilege against self-incrimination, although he never took the stand.

government was free to thoroughly cross-examine him. Any prior inconsistent statements made orally or in writing to government agents or to individuals outside the defense camp clearly could have been utilized to impeach him. *Cf. Harris v. New York*, 401 U.S. 222, 225. But cross-examination, just as other means of presenting evidence, is subject to limitation by principles of confidentiality based on common-law privileges and on the Constitution.

Similarly inapplicable is this Court's opinion in *Harris v. New York, supra,* relied on by petitioner. In *Harris* the defendant himself took the stand, but continued to press a Fifth Amendment claim. Moreover,

> "[i]t is one thing to allow the fruits of a constitutional violation to be used, for cause, after it has occurred outside the trial court. It would be quite another matter to permit it to occur at the hands of the court itself. . . ." *People v. Bais*, 31 Cal. App. 3d 663, 675, 107 Cal. Rptr. 519, 528.

Finally, this Court noted that the policy interest involved in the Fifth Amendment exclusionary rule, deterrence of police misconduct, was not impaired by the use of the statement in *Harris*, since "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225. In the instant case, on the other hand, the court's order significantly impaired the policy interests involved in respondent's choice to surrender either his Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to compel production of witnesses and cross-examine government witnesses.[35]

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[35]The Sixth Amendment interest involved is the right of an accused to defend himself actively. Unquestionably that interest was impaired. *See* pp. 49-52 *infra*.

Two of the most important interests upon which the Fifth Amendment privilege is based were significantly impaired by the Court's order.[36] First, respondent was subjected to the "cruel trilemma" when he was ordered to surrender portions of John Bond's reports. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55; *See* pp. 39-40 *supra*. Second, the government was relieved of the responsibility of shouldering the "entire load" of proof when it was granted access to portions of John Bond's reports. *Id. See* pp. 17-18 *supra*.[37]

The burden of the government does not end, as petitioner urges, at the close of its case in chief. (Pet. br. 56-7). Otherwise, "a defendant's constitutional privilege against self-incrimination is suspended at a given point in his trial." *People v. Bais*, 31 Cal. App. 3d 663, 672, 107 Cal. Rptr. 519, 525.[38]

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[36]The interest in privacy was also significantly impaired. See e.g. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55. This Court's emphasis on the importance of an expectation of privacy suggests that this interest is at stake when the confidential relationship of an individual with his agents is violated. See *Bellis v. United States*, 417 U.S. 85, 101; *Couch v. United States*, 409 U.S. 322, 335.

[37]*Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415-6. See e.g. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55; *Ullmann v. United States*, 350 U.S. 422, 427-28; *United States v. White*, 322 U.S. 694, 698; *Bram v. United States*, 168 U.S. 532, 542. *See* McKay, "Self-Incrimination and the New Privacy." 1967 The Supreme Court Review, 193, 206-14.

[38]The State Court of Appeal in *Bais* held that the trial court erred in ordering disclosure of defense investigators' reports during the defense case for impeachment purposes. 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 The court of appeal in *Bais* as did the court of appeals in Nobles, correctly relied on the California Supreme Court's decision in *Prudhomme v. Superior Court of*

The government's burden to "investigate its own case, find its own evidence, and prove its own facts" can conceivably be lightened by information secured from the defendant, after the close of its case in chief. This information may be used during reopening of its case in chief, as ammunition for cross-examination of defense witnesses, as the basis for new testimony by its own witnesses in rebuttal, or as a lead to be exploited at a new trial. *See United States v. Wright*, 489 F.2d at 1195.

The privilege against self-incrimination extends not only to testimony which may be conclusive on the issue of guilt, but also to information which might furnish "a link in the chain" against the accused. *Hoffa v. United States*, 385 U.S. 293, 304 n.7 *Hoffman v. United States*, 341 U.S. 479, 486.

A defendant, in order to invoke the privilege, need make no showing that the document sought is incriminating, "for the very fact that the prosecution seeks it establishes that in the prosecution's view, it may be incriminating." *Jones v. Superior Court*, 58 Cal. 2d 56, 60, 22 Cal. Rptr. 879, 881. *See Miranda v. Arizona*, 384 U.S. 436, 460.

"Constitutional provisions for the security of person and property should be liberally construed. . . ." *Boyd*

Los Angeles County, 2 Cal. 3d 320, 466 P.2d 673. (Pet. App. 10a-12a). Rejecting petitioner's interpretation of *Prudhomme*, the court in *Bais* stated,

> "The court's use of the reference to case-in-chief may not be construed to mean that a discovery cannot 'lighten the prosecution's burden,' in the constitutional sense, for the sole reason that it occurs after the prosecution has rested. . . . The *Prudhomme* court's full discussion of the privilege precludes such reasoning. . . ." 31 Cal. App. 3d at 672, 107 Cal. Rpt. at 525. (Pet. br. 56-8)

v. United States, 116 U.S. 618, 635 (1886). Consequently, "[t]he privilege has been broadly construed." *Maness v. Meyers,* ____ U.S. ____, 95 S. Ct. 584, 592; See *Spevack v. Klein,* 385 U.S. 511, 515. The government's proposal is seductive, but "[T]hose who framed our constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States,* 116 U.S. 616, 635." *Miranda v. Arizona,* 384 U.S. 436, 459.

As a result, they made the privilege "as broad as the mischief against which it seeks to guard." *Id.,* at 459-60. The court of appeals correctly recognized that the entire investigator's report fell within that privilege.

D. THE SANCTION OF PRECLUSION WAS IMPROPER IN THAT IT VIOLATED RESPONDENT'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS AND CROSS-EXAMINATION OF WITNESSES

After defense counsel advised he would not surrender portions of the investigator's reports, the trial court precluded defense counsel from offering testimony of the investigator which would impeach the eyewitnesses. In so doing, the court denied respondent the right to present witnesses in his own behalf, and also prevented respondent from completing cross-examination of the two government eyewitnesses.

1. Respondent Was Denied The Right To Compulsory Process Guaranteed By The Sixth Amendment When He Was Not Permitted To Present The Testimony Of His Investigator

The Sixth Amendment to the United States Constitution provides, in pertinent part, that,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

Common law rules prohibited large categories of witnesses from testifying for the defendant including the accused himself on the grounds that these strictures would ensure truthfulness of testimony.[39]

The framers of the Constitution, as well as this Court, have repudiated the common law rule since,

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19; *United States v. Burr*, 25 F.Cas. 30, 32 (No. 14, 692d) (C.D. Va.)

As a consequence, this Court held unconstitutional a Texas statute which rendered co-indictees incompetent to testify for one another, since,

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[39] "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of the oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors", *Benson v. United States*, 146 U.S. 325, 336.

> "... the State arbitrarily denied defendant the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Washington v. Texas,* 388 U.S. 14, 23. *See* Westen, "The Compulsory Process Clause" 73 Mich. L. Rev. 71, 108 - 117 (1974).

In presenting the testimony of his investigator, respondent had as strong an interest as did the defendant in *Washington v. Texas.* The accomplice in *Washington* offered to testify that the defendant did not shoot the victim; the investigator offered to testify that the two eyewitnesses who testified against defendant had admitted facts which cast severe doubt on their credibility. In each case, if believed, the testimony would have altered the outcome of the trial in favor of the accused.[40]

When the defendant is denied an opportunity to present material and exculpatory impeachment evidence through the fault of the Government, defendant's fundamental right of due process is denied. *Giglio v. United States,* 405 U.S. 150, 153. Here, the court order denied respondent the opportunity to present impeaching testimony, an act which in effect was as

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[40]This court's recent opinion in *Estelle v. Durrough,* ____U.S. ____ (Mar. 17, 1975), 43 U.S.L.W. 3497 (Mar. 18, 1975) is distinguishable from this case, because defendant in *Estelle* had no Constitutional right to appeal.

serious as if the government had failed to make known to the defendant exculpatory impeachment evidence in its possession. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). If anything, the fact that a specific clause of the Sixth Amendment rather than the "general 'fairness' approach" of the due process clause is at issue, warrants application of a stricter standard of review in this case.[41]

2. The Court's Order Forbidding The Investigator From Testifying As To The Prior Inconsistent Statements Of Government Witnesses Denied Respondent The Right Of Cross-Examination

The right to cross-examine witnesses is guaranteed by the confrontation clause of the Sixth Amendment and has been labeled a "fundamental right", essential to a fair trial. *Pointer v. Texas,* 380 U.S. 400, 403; *See Bruton v. United States,* 391 U.S. 123, 126; *Kirby v. United States,* 174 U.S. 47, 55. As this Court has stated, ". . . certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer v. Texas,* 380 U.S. 400, 404; *Smith v. Illinois,* 390 U.S. 129, 131. An integral part of cross-examination is the opportunity of the cross-examiner to impeach the credibility of a witness.

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[41] In construing the due process clause, the courts apply a more lenient standard of review. *Spencer v. Texas*, 385 U.S. 554,565. See also *Donnelly v. DeChristoforo*, 416 U.S. 637,643; *United States v. Augenblick*, 393 U.S. 348, 356; *Ashe v. Swenson*, 397 U.S. 436, 442-43.

Among the various kinds of impeaching evidence, none is more effective than a prior inconsistent statement. *See Harris v. New York*, 401 U.S. 222, 225. When, as in the instant case, the prior inconsistent statement is in the form of an oral statement made to another individual the culmination of the impeachment occurs when the individual who heard the statement takes the stand as a defense witness and testifies to it. In this case, that individual, John Bond, was not permitted to testify.[42]

> "... Prejudice ensued from a denial of the opportunity to place the witnesses in their proper setting and put the weight of their testimony and their credibility to a test, without which the jury could not fairly appraise them ...." *Alford v. United States*, 282 U.S. 687, 691, 692; *Smith v. Illinois*, 390 U.S. 129, 132.

3. The Governmental Interests In Disclosure Of The Relevant Portions Of The Reports Did Not Justify The Penalty Of Forbidding Respondent The Right To Offer The Impeaching Testimony Of The Investigator

This Court has twice faced, but twice avoided, the decision as to whether the preclusion sanction is valid in light of its burden on a defendant's rights under the

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[42]Respondent's right to the effective assistance of counsel guaranteed by the Sixth Amendment was also burdened by the court's order. The right to effective assistance of counsel includes the right to have counsel or his agents investigate the case. See p. 29 supra. Because counsel was not permitted at trial to present the material and relevant evidence uncovered by the investigator, that right was rendered meaningless.

compulsory process clause of the Sixth Amendment. *Wardius v. Oregon,* 412 U.S. 470, 472 n.4; *Williams v. Florida,* 399 U.S. 78, 83, n.14.[43]

The government's interest in disqualifying the investigator is two fold: first, the elimination of testimony which might possibly be unreliable, and second, penalization of the defendant for violation of a court order.

(a) Government's interest in screening out unreliable testimony.

The government has an interest in ensuring the reliability of testimony. Therefore, it could be argued that the investigator's notes would serve as a means of establishing his reliability, and that in their absence, his testimony was too dubious to be received. A similar argument was made and rejected in *Washington v. Texas,* 388 U.S. at 22; see pp. 50-1 *supra.* This Court did not deny that a co-indictee's testimony might be biased, perjured, and unreliable; nor did it deny that the state had a valid interest in protecting the judicial process from infection by unreliable testimony. Preclusion, however, imposed an unnecessary burden on

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[43]Respondent raised, though inartfully, the issue of the appropriateness of the preclusion sanction at trial. [App. 34-5] In addition, he made the argument both in his brief before the court of appeals and in his brief in opposition to the petition for writ of certiorari in this Court, that he was denied his Sixth Amendment right to cross-examine defense witness when the court precluded the testimony of John Bond.

the Constitutional right to present a defense.[44] This Court stressed the overriding importance of the right to compulsory process, and,

> "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, securing the credit and weight of such testimony to be determined by the jury or by the Court. . . ." *Rosen v. United States,* 245 U.S. 467, 471. *Washington v. Texas,* 388 U.S. at 22.

More recently, an argument similar to that of the government's in *Washington v. Texas* was rejected in *Brooks v. Tennessee,* 406 U.S. 605. Brooks was precluded from calling himself as a witness, because to have done so would have violated a Tennessee statute requiring that defendant take the stand prior to any other defense witnesses. The statute was based on a belief that the defendant in a criminal proceeding is an unreliable witness, tending to tailor his testimony to the testimony of witnesses who have gone before him. This Court did not deny that defendants may be unreliable witnesses or may tailor their testimony to fit what their other witnesses have said, nor did the Court deny that Tennessee had a valid interest in eliminating unreliable testimony. *Id.* at 611. Rather, the Court held that

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[44] Alternative remedies which would have satisfied the Government's interest were available in *Washington.* For example, the Court could have allowed the co-indictee's testimony to be admitted under cautionary instructions to the jury. *See* Westen, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 115-16 (1974).

> "Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id.* at 611.[45]

In the instant case, there was a greater likelihood of precluding reliable testimony. In *Washington,* the witness had already been convicted and sentenced for murder, and the incentive to help a friend by exonerating him would have been strong. Similarly, the witness in *Brooks* had already heard the testimony of his own witnesses, so that the desire to be found innocent would have made it difficult to ignore that testimony in the framing of his own. Here, on the other hand, the witness withheld his prior notes not because the notes embarrassed him, but on the good faith advice of respondent's counsel that the notes contained information legally protected from disclosure.

(b)Government's interest in punishing respondent for violation of court order.

The government has an interest in ensuring respect for court orders. Even if the testimony of the investigator was reliable, it might be argued that the court was justified in penalizing the respondent for his intended refusal to obey a court order. Preclusion, however, is never an appropriate sanction for a party who acts in good faith.

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[45]This Court held that the statute violated defendant's Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination.

In *Societe Internationale v. Rogers*, 357 U.S. 197,[46] the Court held that in light of the serious Constitutional questions raised by depriving a party of the right to put on his case, the sanction of preclusion should apply only to non-disclosure based on "willfulness, bad faith, or . . . fault." *Id.* at 212.[47]

Because of a good faith belief that his position was supported by case, statutory and Constitutional laws, respondent in the instant case did not produce the material sought. It is immaterial that the trial court ruled that the document was unprotected, since respondent had a right to appeal the ruling. *See United States v. Costello*, 222 F.2d 656, 662 (2d Cir.); 4 J. Moore, *Federal Practice*, § 37.03 at 37-69 (2d ed. 1974). If anything, the burden on respondent to justify his avoidance of the sanction of preclusion should not be as heavy as was imposed in *Societe Internationale*.

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[46]Plaintiff, a Swiss corporation, sued the United States. The Government responded by moving under Rule 37 of the Federal Rules of Civil Procedure, to discover certain documents. Plaintiff had possession of the documents but feared that revealing them would subject it to prosecution in Swiss courts for disclosure of confidential documents; Plaintiff refused to surrender the documents, the court refused to permit plaintiff to present its case, and entered a default judgment in favor of the government. In both *Societe Internationale* and in this instance, the party was deprived of the opportunity to present evidence on a substantive issue. *See United States v. Bell*, 506 F.2d 207, 222 (D.C. Cir.); *United States v. Seegar*, 180 F.Supp. 467, 468 (S.D.N.Y.); 8 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2283 at 763 (1970). Note, "Proposed 1967 Amendments to the Federal Discovery Rules, 68 Col.L.Rev. 271, 292 (1968).

[47]*See also, Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 341-42; *Hovey v. Elliott*, 167 U.S. 409, 429; *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 946 (4th Cir.).

Respondent is a defendant in a criminal case, instead of the plaintiff in a civil suit, and was brought into court involuntarily to undergo the risk of losing his liberty. In addition, the Court's order violated specific Constitutional guarantees of the Sixth Amendment instead of the general fairness provision of the 5th Amendment.[48] See note 41 *supra.*

(c) The Court erred in not applying effective alternative sanctions which would not have deprived defendant of the investigator's testimony.

The right to compel testimony and cross-examine witnesses guaranteed by the Sixth Amendment is a fundamental right essential to a fair trial. *Pointer v. Texas,* 380 U.S. at 403. Fundamental rights may be infringed upon only in a least restrictive manner. *See San Antonio School District v. Rodriguez,* 411 U.S. 1, 51; *Shelton v. Tucker,* 364 U.S. 479, 488. Consequently, utilization of the preclusion sanction to achieve the valid purposes of counteracting unreliable testimony and upholding the authority of the court is improper when less drastic means are available.

Assuming the court's order to disclose the relevant portions of the report was valid, the court should have employed a lesser sanction. The court could have explained to the jury that the investigator had written a

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[48] *Cf. United States v. Reynolds*, 345 U.S. 1, 12. Thus, if preclusion is an excessive sanction under the due process clause, it is certainly excessive under the stricter standards of the compulsory process and confrontation clauses.

report of the interview, but would not surrender it despite a court order. Conceivably the court might state its opinion of the evidence. See E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions: Civil and Criminal* § 80.05 (2d ed. 1970). In addition the court could have framed appropriate instructions to the jury; for example, in judging the investigator's credibility, the court could have instructed the jury to weigh the failure to produce the reports against him.[49] The court could have permitted government counsel to comment on respondent's refusal to obey the court order; such comment by the prosecutor, whether or not accompanied by similar comments or instructions by the court, could have a devastating impact on defendant's chances of winning. *See generally, Griffin v. California,* 380 U.S. 609, 614.[50]

Not only did the preclusion sanction violate respondent's Constitutional rights, but more fundamentally, it constitutes a conscious distortion of the fact-finding process[51] and "threatens to permit the conviction of an individual who is innocent of the crime for which he is charged because of his commission of a separate wrong. . ." – the failure to

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[49] *See generally, Carranza-Chaidez v. United States*, 414 F.2d 503, 505 (9th Cir.); E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions: Civil and Criminal* §11.34 (2d Ed.1970)

[50] "The Preclusion Sanction–A Violation of the Constitutional Right to Present a Defense," 81 Yale L. J. 1342 (1972).

[51] *See* Weinstein, "Some Difficulties in Divising Rules for Determining Truth in Judicial Trials," 66 Col. L. Rev. 223, 237 (1966).

comply with court ordered discovery. Thus, imposition of the preclusion sanction in this case conflicts with "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." "The Preclusion Sanction," 81 Yale L.J. at 1361 (1972). In light of these considerations, the trial court should have considered and applied an alternative sanction.[52] Its failure to do so warrants affirmance of the judgment of the court of appeals.

II.

THE MISCONDUCT OF THE PROSECUTOR CONSTITUTES A SEPARATE GROUND UPON WHICH THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.[53]

A. THE PROSECUTOR MISLED THE JURY AS TO THE REASONS JOHN BOND DID NOT TESTIFY TO THE IMPEACHING STATEMENTS OF THE EYEWITNESSES.

The defense investigator, John Bond, was prepared to take the stand and testify that one of the eyewitnesses had told him that all blacks look alike, and that the other eyewitness had told him that he had seen only the back of the robber standing under the surveillance

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[52]See also, Advisory Committee Note to Rule 612, Fed. R. Evid., 56 F.R.D. 277-78.

[53]The court of appeals found that the prosecutor's conduct did not require reversal. [Pet. App. 18a]

camera. The prosecutor was aware of this fact, and knew that the court had precluded John Bond from so testifying because of a legal disagreement concerning the privileged status of investigators' reports. Nevertheless, the prosecutor reinforced and cultivated a false impression of defense irresponsibility by (a) his continual reference, in the presence of the jury, to the existence of defense investigative reports and of his right to them [e.g. App. 11, 13, 14], (b) his misstatement, in the presence of the jury, that the defense attorney misquoted "the evidence and what this witness (Van Gemeren) told Mr. Bond on that occasion," [App. 15] (c) his allegation, in the presence of the jury, that investigator Bond's interview with witness Hoffman was "highly irregular" [Tr. 403][54] (d) his statement in closing argument that investigator Bond was trying to "pull the wool over [their] eyes," [App. 37, 41] and (e) especially, by his comments in closing argument, to which defense counsel noted his objection, that:

> "In regard to what Mr. Bond did or did not do in this case, there has been a little attempt in this case to introduce some racial remarks of some nature in regard to Mr. Hoffman's testimony. Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.
>
> "Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, 'No',

[54]The prosecutor was referring to fact that the interview was held over the telephone. Bond had asked to meet with Hoffman, but Hoffman had replied that his business schedule made a meeting impossible. Hoffman then agreed to be interviewed by telephone. [Tr. 402-3]

to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in the courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony." [App. 41]

B. THE PROSECUTOR IMPROPERLY INTIMATED THAT AN INDEPENDENT DETERMINATION OF DEFENDANT'S GUILT HAD BEEN MADE PRIOR TO TRIAL, AND IMPROPERLY EXPRESSED A PERSONAL OPINION AS TO THE HONESTY OF GOVERNMENT WITNESSES.

During closing argument, the prosecutor stated,

"You know, ladies and gentlemen, Darrell MacIntyre didn't bring this particular indictment. This indictment was brought by the Grand Jury of the Central District of California, and you will have a copy with you. Of course, I have a personal interest in this case, that interest being to see that justice is done, and to see that witnesses come in this courtroom and testify under oath as to the truth of what happened.

. . . Audie Murphy was just a plain, common man, and yet in the World War he won the Medal of Honor. He didn't want to do what he had to do, but he did it.

. . . .

. . . Mr. Hoffman is just a citizen, just a person like any one of you . . . He looked at Robert Nobles, he came into this courtroom, under oath, in front of Almighty God, and he said, "That's the man that was standing underneath the camera.' He has no motive to lie.

When I prepared this case with the help of the F.B.I., I don't bring puppets into this courtroom. I don't have any control over their thinking. . . . They testify under oath.

If it wasn't the man that he saw under that camera, he would have said it wasn't. It is just as simple. They are people trying to tell the truth. [App. 38-9]

. . . .

Mr. Allis: Objection, your Honor. . .

The Court: All right. Let's proceed, Mr. MacIntyre.

Mr. MacIntyre: You know, ladies and gentlemen, when the shoe gets tight the foot starts to squirm, and we've got some squirming feet over here. [Tr. 40]

. . . .

. . . I submit to you he [Hoffman] would not, under oath, say that that is the man if he wasn't sure in his mind that it was. No question about it. [Tr. 742]

. . . .

[John Bond] is trying to pull the wool over your eyes by telling you that these are the lighting conditions in the bank in these photographs. That is the biggest bunch of baloney I have ever heard in my life. . .

. . . .

Ladies and gentlemen, if you run with the hounds you can't complain when you wake up with the fleas. [App. 40]

. . . .

All the F.B.I. has done in this case, ladies and gentlemen, is to investigate it properly to bring you the people they felt were necessary witnesses.

> And they have testified under oath as to the truth in this case. To attack the F.B.I. I think is just spitting in the wind, because these young men have nothing to do but to honestly and intelligently investigate these cases and bring you the witnesses." The F.B.I. has done their job in this case. We ask you to do your job." [App. 41]

The prosecutor's argument suggested to the jury that a determination of guilt had been made before trial by the grand jury, the F.B.I. and the prosecutor. The grand jury, independently of the prosecutor, had charged the defendant, and the F.B.I. had "done their job" in "honestly and intelligently" investigating the case. Finally, the prosecutor took "a personal interest in the case" in order to see that the witnesses told the truth, that justice was done, and that the right man was convicted. The damaging effect of these remarks was aggravated by the court's instruction (to which defense counsel objected) that, "The indictment in this case returned by the Grand Jury for the Central District of California charges as follows. . ." [Tr. 763-4] See *Hall v. United States,* 419 F.2d 582 (5th Cir.)

The prosecutor's statements also constituted introduction of facts which were not in evidence. *McMillian v. United States,* 363 F.2d 165, 168 (5th Cir.) Finally, the assurance expressed by the prosecutor that he was personally interested in seeing that the witnesses tell the truth, juxtaposed against his emphatic declarations that the eyewitnesses were telling the truth and his comparison of Hoffman to a war hero, represented a personal opinion as to the truth of the testimony of the government witnesses and was improper [App. 39]. *See Hall v. United States, supra,* ABA Standards, *The Prosecution Function,* § § 5.8, 5.9 (1971).

C. THE PROSECUTOR CONTINUALLY MISSTATED THE EVIDENCE

1. The Prosecutor Interrupted Cross-Examination Of The Government Witnesses To Misstate Their Testimony In The Presence Of The Jury.

Van Gemeren testified that he saw the side and back of the man under the surveillance camera and admitted that the man's back was toward him "most of the time." [App. 9] Despite this testimony, the prosecutor rose to his feet to make an objection and stated in the presence of the jury:

> "This witness has testified as to the fact that he observed this person's face that he then turned toward the bank manager, he saw him from the side and from the front." [App. 10]

The prosecutor's statement was untrue. In fact, Van Gemeren never testified that he had seen the man "from the front" or that he had observed his "face."

During the cross-examination of Hoffman, defense counsel attempted to establish that Hoffman did not see a front view of the man underneath the surveillance camera. Hoffman testified, "He would have been generally facing toward the teller area, and then occasionally shifting to his right . . ." [App. 18] The next question was interrupted by the prosecutor who stated in the presence of the jury,

> "He said he faced both ways, toward the witness and toward the tellers' area." [App. 19]

In fact, Hoffman never testified that the man faced towards him. Nor did Hoffman's testimony imply that

the man faced toward him.[55] *See Berger v. United States*, 295 U.S. 78, 87.

2. The Lineup And Photospread Occurred More Than Seven Weeks After The Robbery And Not Within 16 Days Of The Robbery.

In closing argument, the prosecutor stated that,

> "The interesting thing about Mr. Hoffman's testimony is . . . at the lineup which he attended, which was on February 23rd, that is 16 days after the robbery, . . . Now, prior to that lineup Mr. Hoffman had picked out the photograph of the defendant Robert Nobles.
>
> At this lineup he picked out the defendant Robert Nobles. . . ." [App. 38]

In fact, the lineup occurred more than seven weeks after the robbery, on March 30th, and the photospread was shown to Mr. Hoffman on March 28th [App. 18, 19]. This misstatement struck at the essence of the defense theory that a substantial length of time between the robbery and the lineup and identification made the identification suspect. [E.g. Tr. 710-11]

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[55] If the man underneath the surveillance camera were facing the teller cages he would have had to "shift" more than 90° to his right to be facing Hoffman, since the surveillance camera was located several feet into the lobby from the business counter against which Hoffman was leaning. (See n.4, supra)

3. Witness Hoffman Did Not Testify That A Struggle Involving Defendant Nobles Made Him Particularly Aware Of Nobles

In argument, the prosecutor maintained that witness Hoffman,

> "... said that the one thing that really drew his attention to the defendant Robert Nobles was that the woman came in the bank, and he grabbed this woman. Then she subsequently ran out of the bank. This is an event which really stuck in his mind, as it would in any one of your minds." [Tr. 676]

In fact, Mr. Hoffman did not testify that the incident involving the woman drew his attention to the defendant. Nor did he testify in any other respect that this event "really stuck in his mind." [See Tr. 328] The argument that the face of an individual becomes imprinted on a witness' mind because of a memorable event is appealing. The prosecutor's misstatement offered an understandable reason why Hoffman, whose opportunity to see the robber under the camera was limited, was able to identify Nobles. (See pp. 5-7, supra)

> "[We] have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger v. United States,* 295 U.S. at 89.

III.

THE COURT'S REFUSAL TO PERMIT TESTIMONY OF RESPONDENT'S EYE-WITNESS IDENTIFICATION EXPERT WAS AN ABUSE OF DISCRETION AND CONSTITUTES A SEPARATE GROUND FOR AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS[56]

The government's case against Nobles was based entirely on two eyewitness identifications of Robert Lee Nobles. Respondent therefore offered Dr. Robert Buckhout as an expert witness to shed light on the problems of eyewitness identification in general, and on the particular problems of identification in this case. The court refused to permit the expert to testify, finding that the offer of proof was inadequate, that his testimony would constitute an invasion of the province

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[56]Respondent raised the issues set forth in Sections II and III before the court of appeals. No cross-petition before this court was filed. However, petitioner stated these two arguments in his Brief in Opposition to the petition for writ of certiorari. The order of this Court granting the writ, on January 20, 1975 did not specifically limit the issues to be briefed. Finally, Respondent relies on the principle that a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U. S. 471,475-6, n. 6; *United States v. American Ry. Express Co.*, 265 U.S. 425, 435; Stern, "When to Cross-Appeal or Cross-Petition–Certainty or Confusion," 87 Harv. L. Rev. 763 (1974).

of the jury,[57] that it would not be of assistance to the trier of fact, and that it would result in an "undue consumption of time." [App. 29][58] The court of appeals found no abuse of discretion. [Pet. App. 6a]

The Supreme Court has made it clear that expert testimony may only be excluded if in the absence of such testimony, all "the primary facts can be accurately and intelligently described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation. . . ." *United States Smelting Co. v. Parry*, 166 F. 407, 411, 415 (8th Cir.). While the trial judge has discretion in the matter of the admission or exclusion of expert evidence, his action must be reversed if there has been an abuse of discretion. *Spring Co. v. Edgar*, 99 U.S. 645, 658; *Salem v. United States Lines Co.*, 370 U.S. 31, 35, reh. denied 370 U.S. 965; *Cohen v. Western Hotels, Inc.*, 376 F.2d 26, 27 (9th Cir.).

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[57]Commentators and courts alike have recognized that when a court excludes testimony on the grounds that, if the witness is allowed to express his opinion, he would be "usurping the function of the jury", the phrase is so misleading, so unsound, that it should be repudiated entirely. 7 Wigmore, Evidence 1920 (3d ed. 1940); See *Rhynard v. Filori*, 315 F.2d 176; 178; (8th Cir.) *Padgett v. Buxton-Smith Mercantile Co.* 262 F.2d 39, 41 (10th Cir.)

[58]The court raised no objection to the qualification of Dr. Buckhout and was apparently satisfied with the complete offer of proof made as to his qualifications. See Clerk's Transcript on Appeal at 72.

A. EYEWITNESS IDENTIFICATION IS AN APPROPRIATE SUBJECT MATTER FOR EXPERT TESTIMONY

Respondent Nobles' offers of proof[59] specifically show why eyewitness identification is a subject of specialized knowledge, and why it is appropriate for expert testimony.

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[59]The phrase "Offer of Proof" refers to the defendant's submitted "Offer of Proof" found at 79 *et seq.* in the Clerk's Transcript of the Record on Appeal and the defendant's Supplemental Offer of Proof marked as defendant's exhibit G. The pertinent parts of exhibit G are included in the appendix at 42. The history of these two memoranda is as follows: On Thursday, April 12, 1972, the court instructed defense counsel to submit an offer of proof as to Dr. Buckhout's testimony on Tuesday morning, April 17, 1973. Defense counsel stated that this would be difficult to do since he would be seeing Dr. Buckhout for the first time on Monday evening, April 16, 1973, when Dr. Buckhout arrived in Los Angeles. [Tr. 411-12] The Offer of Proof was submitted to the court at 9:30 am on April 16, but typographical errors and the need for fuller and clearer expression resulted in the submission of the Supplemental Offer of Proof at 1:30 on the same day, as part of a renewed motion that Dr. Buckhout be permitted to testify. [Tr. 546-47] This second proffer was made before the presentation of Mr. Nobles' case was complete. The Court refused to consider it, but later accepted it for marking as defense exhibit G. [Tr. 664] The specific opinion testimony regarding witnesses Hoffman and Van Gemeren is basically similar, although the Supplemental Offer is clearer and slightly more extensive. The supplemental offer of proof does expand on the theory of recognition and identification; at the time of the submission of the first offer, defense counsel had begun to expand on that subject and to describe the sixteen factors, but was stopped when the court stated that further explanation was not necessary. [Tr. 477]

Dr. Buckhout was prepared to testify concerning recognized theories of recognition and identification in the field of experimental and social psychology. [App. 42] Based on scientifically conducted experiments the hypotheses concludes that approximately sixteen factors affect the reliability of in-court identifications. [App. 42] Dr. Buckhout was prepared to describe these experiments, many of which he had conducted, in order to illustrate how the factors influence eyewitness identification. [App. 42]

B. THE EXPERT'S TESTIMONY WAS ADMISSIBLE UNDER THE OPINION RULE SINCE IT WOULD HAVE BEEN OF APPRECIABLE HELP TO THE JURY AND WAS NOT SUPERFLUOUS.

Since the subject of eyewitness identification is an appropriate area for expert testimony, the court should have admitted the evidence, as long as its admission would not have violated the Opinion Rule. See 7 Wigmore, *Evidence* § 557, (3d Ed. 1940). Dean Wigmore has stated that "[the Opinion Rule] . . . does not exclude . . . all testimony on a specific subject. It simply endeavors to save time and avoid confusing testimony by telling the witness:

" '[T]he tribunal is on this subject in possession of the same materials of information as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary' . . . In some instances, one witness may be able to give real help to the tribunal, while another may not . . . We are dealing

merely with a broad principle, that, whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid on this point, his testimony is superfluous and is to be dispensed with." Wigmore, *supra* § 1918 at 11. A similar test is contained in Rule 702 of the Federal Rules of Evidence.[60]

The Advisory Committee's Note to Rule 702 contains this instructive comment:

> "Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. 'There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.' Ladd, "Expert Testimony", 5 Vand. L. Rev. 414, 418 (1952)."[61]

Van Gemeren's and Hoffman's in-court identifications were affected by five of the same factors:

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[60]The rule provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[61]*See generally, United States v. Cairns*, 434, F.2d 643,644 (9th Cir.); *United States v. Dellinger*, 472 F.2d 340, 383 (7th Cir.); See 2 Grand, Spencer, *Jones on Evidence* §14.9 at 607 (6th ed. 1972); McCormick, *Law of Evidence* §11 (1954).

(1) shortness of the period of observation

(2) feelings of stress

(3) prior conditioning and experience

(4) suggestion inherent in the photographic display

(5) suggestion inherent in the confrontation between eyewitness and Nobles during trial. [App. 42]

A sixth factor, personal bias, affected Hoffman's identification; the length of time between the robbery and subsequent identification was an additional factor affecting Van Gemeren.

Dr. Buckhout would have described how each of the factors which are subtle and often unrecognized affect eyewitness identification and such testimony would have been of particular assistance to the jury. For example, Mr. Hoffman was oblivious of the factor of prior conditioning when he chose defendant Nobles from a photospread and a lineup and consequently became progressively more confident about his choice. [Tr. 401, 404, 428] Dr. Buckhout was prepared to explain that the lineup identification was unreliable because the witness had in effect been coached on the correct answer, by having previously picked out a photograph of Nobles [App. 46]

The eyewitnesses were also unconscious of the suggestibility inherent in the courtroom. Dr. Buckhout would have explained that the in-court identification was unfair because Mr. Nobles was clearly recognizable as a defendant. [App. 46] He was prepared to discuss deficiencies in the use of the photospread, in which the average observer eliminates four or five of the photographs from consideration, and is therefore choosing between two, rather than among six photos.

This Court has expressed its concern with regard to the danger of pretrial identification, stating that,

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.'" Wall, *Eyewitness Identification in Criminal Cases* 26. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.
>
> Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevent evidence) for all practical purposes be determined there and then, before the trial." (footnotes omitted)

See Gilligan, "Eyewitness Identification" 58 Military L. Rev. 183 (1972); Gorphe, "Showing Prisoners to Witnesses for Identification", 1 Am. J. Police Sci. 79, 82 (1930).

Dr. Buckhout would also have been of assistance to the jury in understanding the effect of conscious influences. The court focused on one of those factors,

stress, in denying the defense motion [App. 28]. Stress does appear to be one of the 16 factors which is least susceptible to expert testimony, yet its effect on identification is widely misunderstood. One common misconception is that an initial observation made under stress results in a more reliable subsequent identification. Dr. Buckhout was prepared to discuss data which illustrate the fallacy of this notion, and demonstrate that identification made under stress is apt to be less reliable.

Defense counsel cannot talk convincingly to a jury about these factors since his role is that of an advocate not an expert witness. The task becomes doubly difficult when the prosecutor plays upon the oftentimes simplistic notions of jurors, as in this case, when the prosecutor argued that a stressful moment during the robbery caused the robber identified as Nobles to "stick in the mind" of Hoffman [Tr. 676; pp. 66-7 *supra*]; in addition, the prosecutor claimed that the issue was simply one of whether or not the eyewitnesses were telling the truth (p. 62 *supra*).

Psychologists, writers, and reviewers often testify as to "contemporary community standards" in obscenity cases, where a jury is as equipped to decide without expert help as it is to deal with the problem of eyewitness testimony. Yet, Chief Justice Burger indicated that it would be error for a court to refuse expert testimony, stating that, "The defense should be free to introduce appropriate expert testimony . . . [in an obscenity trial]" *Kaplan v. California,* 413 U.S. 115, 121.

In support of this view, the Chief Justice cited the concurring opinion in *Smith v. California,* 361 U.S.

147, 160, in which Justice Frankfurter maintained that it is a violation of due process to forbid a defendant in an obscenity prosecution to introduce expert testimony on the prevailing literary and moral community standards.

> "... [T]o exclude such testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process.... "Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene..." Id. at 165, See *United States v. Palladino*, 475 F.2d 65, 74 (1st Cir.)[62]

Dr. Buckhout's testimony went to the very "essence" of the defense case and would have been illuminating to the jury.

Several courts of appeals have properly established a "presumption that informed opinion will be admitted." *United States v. Dellinger*, 472 F.2d 340, 383 (7th Cir.); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 339, n.21 (7th Cir.), *Jenkins v. United States*, 307 F.2d 637, 644 (C.A.D.C.).

> "The resulting presumption that informed opinion will be admitted seems particularly appropriate in our increasingly complex society where specialization and segmentation of know-

[62]See Ross, "*Expert Testimony in Obscenity Cases*" 18 Hast. L. J. 161,178 (1966); McGaffey, "*A Realistic Look at Expert Witnesses in Obscenity Cases*", Nw. 69 U.L. Rev. 218, 225 (1974); Lockhart and McClure "Censorship of Obscentity, The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 99 (1960).

> ledge are common, in everyday living as well as at highly technical levels, . . . At the same time it seems that people (including jurors), unexposed to increasing proportions of relevant knowledge and experience, are becoming more capable, because of greater education, of evaluating the expression of expert opinion." 472 F.2d at 383.[63]

Here, no countervailing consideration was present; the court's concern with the undue consumption of time was not well founded. In a criminal case for which petitioner was ultimately sentenced to twenty-five years

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[63]The defendants in *Dellinger* were accused of inciting a riot. They sought to have several witnesses testify as experts about the "subject of crowd or riot control." 472 F.2d at 384. This evidence would tend to show that "police measures caused the crowd to riot," and therefore to "exonerate defendant's speeches from such responsibility." *Id.* The evidence would have included opinions by witnesses that the police broke "existing rules, and regulations, and methods of handling crowds." "Opinions were also to be expressed on crowd reaction to proper as compared to improper police crowd control techniques." The Seventh Circuit held that the exclusion of such testimony constituted an abuse of discretion on the part of the trial court. Crowd reaction, the court stated, "is not a subject equally within the realm of experience of jury members and the 'experts', "*Id.*

Respondent submits there is more reason to admit the testimony of an eyewitness expert such as Dr. Buckhout in the present case, than to admit testimony of experts on crowd or riot control in *Dellinger*. It could be argued that in *Dellinger*, lay witnesses from public agencies could have testified as to existing rules and methods of crowd control and to the behavior of police at the time in question. The jurors on the basis of these primary facts could reach conclusions. However, the court recognized that expert testimony would aid the jury, and consequently rejected this kind of analysis. Respondent urges that this Court similarly reject the trial court's position in this case.

in custody, Dr. Buckhout was the only expert witness whom the defense sought to present. If the spector of numerous expert witnesses, not present in this case, were to arise, a court might properly limit the number of such witnesses. Total exclusion, however, was improper.[64]

Dr. Buckhout possessed information based on scientific experiment and unfamiliar to the average person, about the factors affecting the reliability of eyewitness identification. This information would have been of assistance to the jury in reaching its determination as to the weight to be accorded the eyewitness testimony. The trial court's refusal to permit such testimony was an abuse of discretion and warrants affirmance of the judgment of the court of appeals.

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[64]It should be noted that testimony of several government experts was admitted at trial. One of these experts was permitted to compare objects pictured in bank surveillance photographs with similar objects pictured in photographs taken after the arrests. This clearly violated the opinion rule and subsequently the court of appeals held that admission of much of the testimony constituted error. Although not admitted directly against Nobles, the testimony was damaging. The testimony was damaging and had a "spill-over" effect on respondent. (*See* Pet. App. 2a-5a).

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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